



Tal S. Benschar
tbenschar@koffskyschwalb.com

500 Seventh Avenue, 8th Floor
New York, New York 10018
T: 646.553.1590
F: 646.553.1591
www.koffskyschwalb.com

January 15, 2025

VIA ECF and EMAIL

Hon. Katherine Polk Failla
United States District Court
40 Foley Square
New York, NY 10007

MEMO ENDORSED

Re: *Flycatcher Corp. Ltd. et al v. Affable Avenue LLC, et al.*
No. 1:24-cv-09429-KPF

Dear Judge Failla:

This firm represents plaintiffs Flycatcher Corp. Ltd. and Flycatcher Toys Inc. (collectively “Flycatcher”). We write with two applications: (1) for an order for substitute service as to two defendants we have been unable to serve and (2) for early discovery as to one issue.

Background

This case involves the sale of a large quantity of stolen goods by various internet merchants. The sale of such goods, bearing Flycatcher’s registered mark, deceives the consuming public and has caused irreparable harm to Flycatcher. In particular, Defendants advertise the goods on the same internet platforms used by Flycatcher, without informing their customers and potential customers that the goods are stolen.

As Flycatcher will not honor the warranty for stolen goods, the customers thereby receive an inferior and materially different product, which cheats such customers, infringes upon Flycatcher’s trademark rights, and involves false and deceptive advertising, all in violation of federal and state law.

Flycatcher has brought suit against fourteen (14) defendants, all sellers of the infringing, stolen product on Amazon.

Order for Substitute Service as to Two Defendants

While Flycatcher has managed to effect service on most of the defendants, it has been unable to effect service on two, both California Limited Liability Companies.

A legal entity may be served “in the manner prescribed by Rule 4(e)(1) for serving an individual.” Fed.R.Civ.P. 4(h)(1)(A). Rule 4(e)(1) provides that an individual may be served by “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.”



Hon. Katherine Polk Failla
January 15, 2025
Page 2

The California Revised Uniform Limited Liability Company Act provides:

[I]f the designated agent cannot with reasonable diligence be found at the address designated for personal delivery of the process, and it is shown by affidavit to the satisfaction of the court that process against a limited liability company or foreign limited liability company cannot be served with reasonable diligence upon the designated agent by hand in the manner provided in Section 415.10, subdivision (a) of Section 415.20, or subdivision (a) of Section 415.30 of the Code of Civil Procedure, the court may make an order that the service shall be made upon a domestic limited liability company or upon a registered foreign limited liability company by delivering by hand to the Secretary of State, or to any person employed in the Secretary of State's office in the capacity of assistant or deputy, one copy of the process for each defendant to be served, together with a copy of the order authorizing the service. Service in this manner shall be deemed complete on the 10th day after delivery of the process to the Secretary of State.

Cal.Corp.Code § 17701.16 (2023). *See Nautilus Ins. Co. v. Nulife Mulholland, LLC*, 2024 WL 1677521 (C.D. Cal. 2024) (granting such an order where the plaintiff showed it could not serve the defendant LLC with reasonable diligence).

Plaintiffs have been unable to serve two LLC defendants, and request orders that would permit them to serve the California Secretary of State.

Top Experience Company LLC d/b/a We Pay Cost LLC

This company is registered with the California Secretary of State, giving the identical address for its principal office and registered agent, both in El Monte, California. (Exh. 1) The process server twice attempted to serve there. The first time the server spoke with an individual who stated there was no business there by that name. The second time he was unable to access the address due to a private gate/fence. (Exh. 2) The filing with the California Secretary of State (Exh. 1) gives no information about the individuals who are principals or managers of the company. An attorney for this defendant contacted us, but stated he was not authorized to accept service.

Accordingly, we have no way of serving this company through reasonable diligence. We request that the Court enter an order in the form of Exhibit 3, so we can serve the California Secretary of State.

Fortuna KG LLC d/b/a FortunaKG

This company is registered with the California Secretary of State, giving the identical address for its principal office and registered agent, both in Irvine, California. (Exh. 4) The process server



Hon. Katherine Polk Failla
January 15, 2025
Page 3

attempted to serve there, but the occupant there stated that he was the new tenant, and that the business had moved. (Exh. 5) Although the LLC filing (Exh. 4) lists an individual who is apparently the principal, we have tried but have no way of finding him

Accordingly, we have no way of serving this company through reasonable diligence. We request that the Court enter an order in the form of Exhibit 6, so we can serve the California Secretary of State.

Requests For Early Discovery

Rule 26(d), Fed.R.Civ.P., provides that a party to a civil action may not seek discovery before the parties have conferred as required by Rule 26(f), except in certain limited categories of case exempted from the initial disclosure rules “or when authorized ... by [Court] order.” Courts in this Circuit generally apply the flexible “good cause” standard for granting such an order, as established in *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326 (S.D.N.Y. 2005).

After Flycatcher effectuated service on a number of defendants, they approached us to attempt to settle the case. To do so, we need to ascertain the extent of their sales of the infringing product. While the defendants have proffered figures of sales and remaining inventory, we need to confirm these before we can arrive at a settlement figure.

Accordingly, Flycatcher requests leave to serve a subpoena (Exhibit 7) on Amazon to obtain records from a neutral third party. The subpoena is limited to sales and inventory by the named defendants, to the time period since the goods were stolen, and to the specific item at issue. The latter is identified by an Amazon Standard Identification Number (ASIN), which Amazon uses to identify each unique product offering. Once we receive this information, we are hopeful we will be in a position to settle with some of the defendants.

We requested this information from Amazon, but Amazon indicated it needs a court subpoena to release this information.

We submit that we have shown good cause to permit serving this limited discovery.

Respectfully Submitted,
Tal S. Benschar
Tal S. Benschar

Application GRANTED. The Court has issued the orders regarding substitute service, and so-ordered the subpoena, under separate cover.

The Clerk of Court is directed to terminate the pending motion at docket entry 51.

Dated: January 16, 2025
New York, New York

SO ORDERED.

A handwritten signature in blue ink, reading "Katherine Polk Failla".

HON. KATHERINE POLK FAILLA
UNITED STATES DISTRICT JUDGE